IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPEAL NO.701 OF 2001

(By accused against conviction)

Leelabai Durgya Jadhav & anr ..Appellants

versus

The State of Maharashtra .. Respondents

Mr.Suresh Sabrad for Appellants

Dr.F.R.Shaikh, APP for State

WITH CRIMINAL APPEAL NO. 702 of 2001

Anil Durgya Jadhav .. Appellant

,

versus

The State of Maharashtra .. Respondent

CORAM : SMT.RANJANA DESAI AND D.G.KARNIK, JJ

DATED: Reserved on: 21st April, 2006

Pronounced on:4th May,2006

ORAL JUDGMENT (Per D.G.Karnik, J)

1. These two appeals are directed against the judgment and order dated 26th June, 2001 passed by the IInd Additional Sessions Judge, Baramati, Pune convicting the accused nos.1 to 3 under section 498A read with section 34 of I.P.C. and also convicting the accused nos. 2 and 3 under section 302 read with section 34 of I.P.C. Criminal Appeal No.701 of 2001 is filed by the accused no.1 while Criminal Appeal No.702 of 2001 is filed by accused nos. 2 and 3.

The prosecution case is summarised below :

2. Accused no.1 is the husband of Kalpana (hereinafter referred to as the deceased). Accused no. 2 is the mother and accused no. 3 is brother of accused no.1. All of them were living jointly. At the time of marriage of the deceased, her father, who was a coolie, had promised to give to the accused dowry of Rs.500/- silver patties for wearing in the feet and gold earrings. He gave all the things promised but the gold earrings at the wedding. Even though more than a year passed the

father of the deceased could not give the gold earrings promised by him. On that count, the accuseds were illtreating the deceased. They told the deceased to bring in cash Rs.10,000/- from her parents in lieu of the earrings. On the morning of 25th July, 1998 there was a quarrel between the accuseds and the deceased on account of the fact that the deceased had not complied with their demand of the errrings or cash. Soon after the quarrel accused no.1, the husband of the deceased, left home stating that he would bring petrol and burn the accused. Thereafter at about 11.30 a.m. when the deceased was washing clothes accused no.2, the mother-in-law of the deceased, came and poured kerosene on the deceased. Thereafter, accused no.3 the brother-in-law of the deceased took out a match stick from a match box, lighted it and threw it on the deceased. The deceased caught fire and was burnt. As the deceased started burning she raised shouts whereupon the neighbour Sushila Baburao Gaikwad came and extinguished the fire by pouring water on the deceased. Thereafter Anita Gaikwad the aunt of the deceased and one Nageshwari Jadhav came and took the deceased to the government hospital. The deceased was not admitted there but was directed and taken to Ashwood Hospital where

she was admitted as an indoor patient for about 17 days. The deceased was then taken home by her parents. The deceased died on 2nd September, 1998. Post mortem was done which revealed that the deceased died on account of shock due to burns. Soon after the incident Prabhakar Gaikwad uncle of the deceased informed the police. Vital Baburao Narute, Assistant Sub Inspector immediately went to the government hospital where he was informed that the deceased was taken to Ashwood Hospital, Daund. He reached Ashwood hospital by noon and recorded the statement of the deceased between 12.30 and 12.45 noon after ascertaining from the doctor that the deceased was in a fit condition to give the statement. Dr.Pawar, the Medical Officer on duty also put his signature by the side of the signature of the deceased. That statement was regarded as the first information report as also the first dying declaration. ASI Narute thereafter informed Keshav Atole the taluka Executive Magistrate to record a dying declaration of the deceased. Accordingly, Mr. Atole PW 4 went to the hospital at about 1.25 p.m. and recorded the dying declaration of the deceased. Prior to the recording of the dying declaration he ascertained from the doctor whether the deceased was in a fit

conditiion to make any statement. Dr. Pawar, the medical officer on duty confirmed that the deceased was in a fit condition to make a statement. Accordingly, dying declaration of the deceased was recorded by Atole. Dr.Pawar also put his signature in margin of the said dying declaration. After conducting the necessary investigation and recording the statements of the witnesses, charge sheet was filed against the accuseds for the offence punishable under section 302 and 498-A read with section 34 of the Indian Penal Code.

3. After trial and on appreciation of the evidence, the learned Sessions Judge held that the accused nos. 2 and 3 had set the deceased on fire and had caused her death. He accordingly convicted them under section 302 read with section 34 of the Indian Penal Code and sentenced them to suffer imprisonment for life. He also held that all the accused had caused harassment of the deceased with a view to coerce her and her father to meet their unlawful demand of earrings and money. Accordingly, all the accused were held guilty of an offence punishable under section 498-A read with section 34 of the Indian Penal Code and were sentenced to suffer rigorous imprisonment for two

years and to pay fine of Rs.500/- and in default to suffer rigorous imprisonment for three months.

4. The prosecution examined eight witnesses namely Baban Gaikwad, the father of the deceased as PW1, Ankita Gaikwad the aunt of the deceased as PW2, Dr.(Mrs) Subhangi Kulkarni the doctor who conducted the post mortem as PW 3, Mr. Keshav Atole the taluka executive magistrate as PW 4, Sushila Gaikwad the neighbour who extinguished the fire of the deceased as PW 5, Shyam Jadhav, the panch witness as PW 6, Vital Narute ,ASI who was the investigating officer as PW 7 and Dr.P.B.Pawar, the medical officer at Ashewood Hospital as PW 8. PW 2, PW5 and PW 6 have turned hostile and their evidence is not of much assistance to the prosecution. Even Baban Gaikwad (PW 1) the father of the deceased, was declared hostile. We have gone through the evidence of Baban Gaikwad (PW 1), the father of the deceased in its entirety. Though he was declared as hostile, it appears to us that being a coolie and belonging to the lowest strata of society, he was unable to understand and answer properly couple of questions put to him in the examination-in-chief and merely on that account he was declared as hostile. We do not find him to

have resiled from his previous statement made to the police and has otherwise supported the prosecution. In his examination-in-chief, he was declared as hostile. He has stated that after the marriage, the deceased had visited visited his house and told him that the accused no. 1 was insisting her to bring the money. He has further stated that the deceased had told him that on that account the accused was giving threats to her. He has further deposed that soon after the incident of burning his brother Prabhakar phoned him from Daund and informed him that the deceased was set on fire by the accused nos. 2 and 3 and on receiving the phone call he had gone to Daund and to the hospital and had met the deceased. After this statement, as stated earlier, perhaps on account of misunderstanding of a question or two he was declared as hostile and cross-examined by the prosecution. In the cross-examination he stated that the deceased was being illtreated and beaten by the accused as they were insisting her to bring (money) to reimburse the expenses incurred for marriage. He further stated that in the hospital, the deceased told him that the accused nos. 2 and 3 had assaulted her as she had ot brought Rs.10,000/- and further told him that the accused

no.2 poured kerosene on her person and the accused no. 3 set her on fire by throwing on her a live match stick. He was cross-examined by the accuseds. He did not resile from the aforesaid statements made by him. Read as a whole, we are satisfied that he is a truthfull witness and has supported the prosecution case deposing that when the deceased had visited his house prior to her death she had narrated about the harassment for the money by the accused. He has further deposed that when he met the deceased in the hospital, she told him about being set on fire by accused nos. 2 and 3.

5. It appears that a cryptic information was orally passed on by Prabhakar the uncle of the deceased to the police that the deceased was burnt by the accused. It appears that thereafter ASI Vital Narute PW 7 rushed to the government hospital where he was told that the deceased was taken to Ashwood Hospital, Daund. He then went to Ashwood hospital and recorded the statement of the deceased between 12.30 and 12.45 noon on the same day. This was within an hour and half of the incident. This statement (Exhibit 33) was recorded as the first information report and was regarded as the first

dying declaration by the Sessions Judge. Even in this first information report cum- first dying declaration, the deceased clearly stated that in the morning there was a quarrel between her and the accused on account of inability of the deceased to get from her father Rs.10,000/- in lieuof the earrings. She has further narrated that the accused no.2 poured on her body kerosene and the accused no.3 lighted her with a live match stick. In this statement, she did not falsely implicate her husband in the incident of burning and fairly stated that her husband was not present at that time. ASI Narote then took care to inform this incident to Keshaw Atole, the taluka executive magistrate Mr.Atole (PW 4) in his deposition has stated that on receiving the information from the police at 1 p.m. he went to Ashwood Hospital at 1.25 p.m. and recorded the dying declaration of the deceased. He has further stated that before recording the dying declaration he checked with the doctor Pawar who told him that the patient was in fit condition to make a statement. He stated that deceased was conscious and that he recorded the dying declaration of the deceased. He proved the dying declaration recorded by him which was marked as Exhibit 29. The deceased has stated in this

dying declaration about the quarrel in the morning between her and the accuseds. She has also stated that the accused no.2 put kerosene on her body and the accused no.3 set her on fire. This second dying declaration (Exhibit 29) is consistent with the first dying declaration at (Exhibit 33). In both the dying declarations, the deceased has specifically named the accused nos. 2 and 3 and has narrated the part played by each of the accused i.e. the accused no.2 throwing kerosene and accused no. 3 lighting her with a live match stick. It is worthy to note that though she has complained about the harassment to her by her husband she has not falsely implicated him in the incident of burning and has stated that after the quarrel in the morning her husband left the house and was not present when she was actually set on fire.

6. Dr.Pawar who was examined as PW 8 has stated that he had examined the deceased before recording of the dying declaration and he was satisfied that the patient was conscious. This part of the testimony of Dr.Pawar about his examining the deceased and she being conscious at the time of recording of the dying declaration is not at all

impeached in cross-examination. We are thus satisfied that the deceased was conscious and in a fit condition to make a dying declaration. We are also satisfied that the dying declarations made by the deceased were voluntary and she has not falsely implicated anybody including her husband in the actual act of setting her on fire. The dying declarations inspire confidence. It is settled principle of law that if a dying declaration is clear and unambiguous which in the present case is, the conviction can be based solely on the dying declaration. Furthermore, we find corroboration to the dying declaration from the testimony of her father (PW 1) who has stated that the deceased had told him about the harassment that when she had visited his house. He has further stated that even in the hospital, the deceased narrated the incident of setting her on fire by the accused nos. 2 and 3. Therefore even if the three witnesses PW 2,5 and 6 have turned hostile that would not in any way affect the prosecution case.

7. Learned counsel for the accused invited our attention to the indoor patient chart (Exhibit 44) maintained at Ashwood Memorial Hospital. That was produced by Dr.Pawar. In the said chart under the

heading " previous diagnosis " the doctor has written following remark " 25 % burns and accidental ". On the basis of this entry, Dr.Pawar in his deposition stated that the patient had stated that she had sustained accidental burns at 11 a.m. Strongly relying upon the entry in the case papers and the admission of Dr.Pawar that the deceased had stated that she suffered accidental burns, the counsel submitted that the deceased was not set on fire by the accused nos. 2 and 3 as alleged but the deceased suffered accidental burns. In any event, submitted counsel, that reasonable doubt exists as to whether the deceased was set on fire by the accused nos. 2 and 3 as alleged or whether the deceased caught fire accidently. From the case papers produced it appears that the case papers were prepared at 1 p.m. The first entry in the case papers shows that it was made at 1 p.m. on 25th July, 1998. Taking into consideration that the incident occured at 11.30 a.m. and the fact that the deceased was first taken to the government hospoital, where she was not admitted was required to be taken to Ashwood Memorial Hospital it appears that the deceased must have been reached to the hospital a little prior to 12.30 noon. As per the evidence of ASI Narute PW 7, he rushed to the

hospital and recorded the statement of the deceased between12.30 and 12.45.. He has stated on oath that in the said statement cum first dying declaration the deceased had stated that she was set on fire by the accused nos. 2 and 3 This was again stated by the deceased in the second dying declaration recorded by the taluka executive magistrate an hour thereafter. Both these dying declarations were proved by ASI Narute (PW 8) and Mr.Atole (PW 4), the taluka executive magistrate respectively. In the light of these, we are unable to accept the entry " 25 burns accidental" appearing in the case papers as correct. The entry clearly is erroneous. It appears to have been made on the basis of the history given by the relatives who had accompanied the deceased. Taking into consideration the fact that Anita Gaikwad, the aunt of the deceased, who had accompanied her to the hospital has turned hostile before the court we cannot rule out the possibility that she having given the history of " burns-accidental" erroneously. In any event, we believe the two dying declarations and the statement made by the deceased therein that she was set on fire by the accused nos. 2 and 3.

For these reasons, there is no merit in either of the appeals which are hereby dismissed. The conviction and sentence of the accused passed by the learned Sessions Judge are confirmed.

At this stage, Mr.Sabrad the learned counsel for the appellants states that appellant no. 1 Leelabai Durgya Jadhav may be given some time to surrender. He says that four weeks time may be granted to appellant no.1. In the circumstances of the case, four weeks' time is granted to appellant no. 1 to surrender.

(Smt Ranjana Desai, J)

(D.G.Karnik, J)